Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1368

CONSOLIDATED CARRIERS CORP., and/or
TRUCKING PERSONNEL, INC.,

Petitioners,

vs.

CLOAK DRESS DRIVERS AND HELPERS UNION LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. _____

CONSOLIDATED CARRIERS CORP., and/or
TRUCKING PERSONNEL, INC.,

Petitioners,

vs.

CLOAK DRESS DRIVERS AND HELPERS UNION LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 8, 1978.

Citations to the Opinions Below

The opinion of Judge Robert J. Ward granting Respondent's motion to compel arbitration and denying the motion of Petitioner Consolidated Carriers Corp. ("Consolidated") to stay arbitration is unreported and appears in Appendix B (3a-12a) *infra*. The opinion of the Court of Appeals for the Second Circuit is unreported and appears in Appendix A (1a-2a) *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on December 8, 1978 Appendix B (1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

The federal statute involved is 29 U.S.C. §§157, 159, 160(a) and 173(d) [Acts of July 5, 1935 c. 372, 49 Stat. 452; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947 c. 120, 61 Stat. 143; June 25, 1948, c. 646; 62 Stat. 991, May 24, 1949, c. 139, 63 Stat. 107; August 28, 1958, Pub. L. 85-791, 72 Stat. 945; September 14, 1959 Pub. L. 86-257, 73 Stat. 544].

Questions Presented

1. May a union compel an employer to arbitrate a dispute which involves only an issue of representation of the latter's alleged employees?

2. May the issue of representation be resolved by an arbitrator when a representation petition is pending before

the National Labor Relations Board ("Board") in a proceeding to which the disputant union and a rival union, which is not a party to the arbitration proceedings, are participants?

3. Does the Board have exclusive and primary jurisdiction over the subject matter of representation so that the Board may never defer to an arbitrator's award which deals with the question of representation?

4. Should the decision by this Honorable Court in *Carey* v. *Westinghouse Electric Corp.* [375 U. S. 261 (1964)] be reevaluated and overruled to the extent that it sanctions arbitration of a representation issue?

Statement

This suit originated in a representation proceeding initiated by a petition for certification filed with the Board on July 10, 1978, by a Local 20408 of the United Warehouse Industrial and Affiliate Trades Employees ("Local") which seeks to represent the employees of Consolidated and an alleged related employer, Trucking Personnel, Inc. ("Trucking"). Respondent intervened in the Board proceedings and claimed that a labor agreement ("Agreement") with Consolidated constituted a contract bar to the petition filed by the Local. After two sessions, the hearings on the representation petition were postponed pending the determination of unfair labor practice charges filed by the Local against Consolidated.

Eleven days later after the Local filed its petition with the Board, Respondent served a demand for arbitration, under the Agreement, alleging that Trucking was and is an affiliate of Consolidated and asserting that by virtue of a so-called "affiliate" clause, the Agreement automatically

conferred upon Respondent the right to represent Trucking's employees—the very issue involved in the representation proceedings pending before the Board.

After the demand for arbitration was made, Consolidated obtained an order of the Supreme Court of the State of New York staying the then scheduled arbitration hearing. Thereafter, Consolidated's action was removed to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §1441 and Respondent moved to compel arbitration. On September 25, 1978 the District Court (Ward, J.) granted Respondent's motion and denied Consolidated's motion to stay arbitration. An appeal was then taken to the Court of Appeals for the Second Circuit from the judgment of the District Court. Pending appeal, the Court of Appeals granted a stay of arbitration. After argument of the appeal, the Court of Appeals affirmed the judgment below (Appendix A, 1a-2a). Arbitration hearings commenced and are continuing despite Consolidated's objections to the jurisdiction of the arbitrator.*

* In a directly related case, arbitration proceedings have been postponed and a substantially similar representation petition was filed by the Local. Respondent intervened again relying upon the Agreement as a contract bar. After a Board hearing, the Regional Director of the Board issued a Decision and Direction of Election which explicitly deals with the identical issue of representation now before the arbitrator in this case. A copy of that Decision is annexed hereto as Appendix C.

REASONS FOR GRANTING THE WRIT

1. This appeal is an appropriate occasion for this Honorable Court to correct a manifest error in the decision in *Carey* v. *Westinghouse Electric Corp., supra,* and to foreclose a misreading of that decision which has created critical problems in the administration of the federal labor laws.

2. The Court of Appeals summarily decided an important question of federal labor law and assigned an impermissible role to arbitration by failing to consider recent decisional developments which overruled the principal authority relied upon by this Honorable Court in *Carey* v. *Westinghouse Electric Corp., supra.*

3. The thesis underlying the decision by the Court of Appeals and adopted from the decision in *Carey* v. *Westinghouse Electric Corp., supra,* is that the Board may, but need not, defer to an arbitrator's award. This error was compounded by a failure to distinguish between conduct which may constitute a breach of a labor contract and an unfair labor practice so that deference to an arbitration award may be proper [*Collyer Insulated Wire,* 192 NLRB 837 (1971); *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955)], and an attempt to arbitrate an issue of representation when the Board's jurisdiction is absolute, unconditional and completely preemptive of any judicial or quasi-judicial action.

4. Since the issue submitted by the Respondent to the arbitrator is whether Respondent has the right to represent Trucking's employees, reference must be made to the Labor-Management Relations Act of 1947, as amended, ("Act"). Sections 7 and 9 of the Act [29 U.S.C. §§157, 159] assure employees of the right to select their own representatives for collective bargaining. Unlike Section

10(a) [29 U.S.C. §160(a)], which treats of unfair labor practices and encourages "other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.", Section 9 of the Act [29 U.S.C. §159], which prescribes representation procedures, does not refer to, or contemplate private election or other procedures such as arbitration, to decide a representation claim or dispute. The fact is that "The Board's statutory duty to define the appropriate bargaining unit and supervise the election of the proper bargaining representative for the employees leaves little or no scope for deference to arbitration" [*The NLRB and Deference to Arbitration,* 77 Yale L.J. 1191, 1196 (1968)].

It is hornbook law that the primary responsibility for determining the appropriateness of a unit for collective bargaining is vested in the Board [*State Farm Mutual Automobile Ins. Co.* v. *NLRB,* 411 F.2d 356, 358 (7th Cir. 1969) (en banc), cert. den. 396 U. S. 832; *NLRB* v. *Chicago Health and Tennis Clubs, Inc.,* 567 F.2d 331 (7th Cir. 1977)] and it is equally clear that the broad powers conferred by Congress upon the Board to interpret and enforce federal labor law necessarily imply that potentially conflicting rules of law, of remedy and of administration cannot be permitted to operate. [*Vaca* v. *Sipes,* 386 U. S. 171 (1967); *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959)].

5. We point out that *Carey* v. *Westinghouse Electric Corp., supra,* was bottomed upon the Board's decision in *Raley's Supermarkets, Inc.* [143 NLRB 256 (1963)] which has now been discredited, rejected and abandoned by the Board, [*Hotel Employers Association of San Francisco,* 159 NLRB 143, 147-49 (1966)]; [*Pullman Industries, Inc.,* 159 NLRB 580 (1966)]; [*Marion Power Shovel Company, Inc.,* 230 NLRB No. 85, 95 LRRM 139 (1977)]; [*Long Island College Hospital* v. *NLRB,* 566 F.2d 833, 845, fn. 7 (1977)]. We submit, too, that arbitration cannot have a "persuasive, curative effect", [*Carey* v. *Westinghouse, supra,* at p. 272] in a dispute concerning representation because it cannot play any role at all. *Carey* v. *Westinghouse Electric Corp., supra,* involved, as Mr. Justice Black pointed out in his dissent, "a plain . . . jurisdictional dispute" (id. p. 273), and such a dispute is, indeed, arbitrable and arbitration performs a useful function. [*United Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Co.,* 363 U. S. 574 (1960)]. At best, then, this Honorable Court's suggestion that arbitration may operate in representation disputes is *dicta.*

6. In any event, the nonparticipation by the Local in the arbitration proceedings, coupled with the pending representation proceedings, shows that deferral is foreclosed. [*Captive Plastics, Inc.,* 209 NLRB 749 (1974)] nor can there be deferral where the employees' rights under Section 7 of the Act [29 U.S.C. §157] is involved. [*General American Transportation,* 228 NLRB No. 102, 94 LRRM 1483 (1977)].

CONCLUSION

This Court should grant the petition for certiorari and hear the issues raised in this important area of ~~civil rights~~ Labor Law.

Respectfully submitted,

HERBERT BURSTEIN,
Attorney for Petitioners.

[APPENDICES FOLLOW]

APPENDIX A

Judgment of the United States Court of Appeals for the Second Circuit

(Filed—December 8, 1978)

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of December one thousand nine hundred and seventy-eight.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE J. JOSEPH SMITH
HONORABLE ELLSWORTH VAN GRAAFEILAND,
Circuit Judges,

78-7488

In the Matter of the Arbitration Between

CONSOLIDATED CARRIERS CORP. and/or
TRUCKING PERSONNEL, INC.,

Petitioner-Appellant,

v.

CLOAK DRESS DRIVERS AND HELPERS UNION LOCAL 102,
INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of New York.

Appendix A

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, *See Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). Cases dealing with the question of Board deference to the arbitrator's decision are inapposite. "[T]he authority of the Board and the law of contracts are overlapping, concurrent jurisdictions, neither pre-empting the other." *United Aircraft Corp.* v. *Canel Lodge No. 700,* 436 F.2d 1, 3 (2d Cir. 1970).

Irving R. Kaufman,
Chief Judge

J. Joseph Smith,
Ellsworth Van Graafeiland,
Circuit Judges

APPENDIX B

Memorandum Opinion of Robert Ward, D.J. Dated October 16, 1978

United States District Court
Southern District of New York

78 Civ. 3756(RJW)

In the Matter of the Arbitration Between

Consolidated Carriers Corp. and/or
Trucking Personnel, Inc.,

Petitioner,

against

Cloak Dress Drivers and Helpers Union Local 102,
International Ladies' Garment Workers' Union,

Respondent,

Petitioner Consolidated Carriers Corp. ("Consolidated") and/or Trucking Personnel, Inc. ("Trucking") moves to stay arbitration between it and respondent, Cloak Dress Drivers and Helpers Union Local 102, International Ladies' Garment Workers' Union ("Local 102") due to the pendency of certain proceedings before the National Labor Relations Board ("NLRB" or "the Board"). Local 102 cross-moves to compel arbitration with Consolidated.

Appendix B

For the reasons hereinafter stated, respondent's cross-motion is granted and petitioner's motion is denied.[1]

Consolidated is a local carrier service operating in the New York City garment district. Trucking is a manpower company which supplies companies in the garment district with pushboys, messengers and helpers. Approximately eighty percent of Trucking's personnel is supplied to Consolidated. Trucking is owned by a minority shareholder of Consolidated. The two corporations operate from the same premises and have some common supervisory personnel.

Local 102 is the collective bargaining representative of certain employees of Consolidated pursuant to a collective bargaining agreement between Associated Dress Carriers of Brooklyn & Queens, Inc. and Local 102. That agreement provides for the final and binding arbitration of all complaints involving questions of interpretation or application of any clause in the agreement. The employees of Trucking are not directly covered under the collective bargaining agreement. However, Paragraph Twenty-Fifth thereof provides:

> Each member of the Association shall be liable for the performance of the terms and provisions of this agreement by all of its subsidiary and affiliate firms or corporations. Such subsidiary and affiliated firms or corporations shall be bound by all of the terms and provisions of this agreement in the same manner as if they were members of the Association.
>
> The impartial Chairman shall have the right to determine whether an alleged subsidiary or affiliate of a member is such subsidiary or affiliate and shall be guided by the proof of facts tending to establish any connection or interest (direct or indirect) between them, or tending to establish a plan, scheme or device on the part of such member to avoid or evade the provisions of this agreement by or through such subsidiary or affiliate, directly or indirectly.

[1] Petitioner commenced this action by order to show cause and obtained a temporary restraining order in state court on August 10, 1978. On August 14, 1978, respondent removed the action to this Court pursuant to 28 U.S.C. §1441. At oral argument before this Court on August 25, 1978, petitioner withdrew its application for an extension of the temporary restraining order, and respondent cross-moved to compel arbitration.

Appendix B

The arbitration in issue was demanded by Local 102 pursuant to the collective bargaining agreement in a complaint filed July 31, 1978. One of the claims Local 102 seeks to arbitrate asserts that Consolidated has breached Paragraph Twenty-Fifth by not requiring Trucking, an alleged subsidiary or affiliate, to comply with the terms of the collective bargaining agreement.[2]

[2] The arbitration complaint of July 31, 1978 also alleges violations of the paragraphs of the collective bargaining agreement which provide that Local 102 is the exclusive bargaining agent of the covered workers and that membership in Local 102 is a condition of employment for all covered workers. Local 102's complaint further alleges a breach of the terms of the agreement relating to union security, wage scales and minima, holidays, vacations, benefit funds, and the check off of dues, and requests the arbitrator to determine the "alter-ego, affiliate or subsidiary" status of Trucking. The relief sought is liquidated damages for certain of the violations, an injunction against

(Footnote continued on following page)

Appendix B

On July 10, 1978, an unrelated union, Local 20408 of the United Warehouse, Industrial and Affiliate Trades Employees ("Local 20408") filed a petition with the NLRB for certification as the collective bargaining representative of "[a]ll truck helpers, pushmen, rack men, and warehousemen, delivery men, and messengers" employed by Consolidated and/or Trucking in their New York City location. On August 2, 1978, Local 20408 also filed an unfair labor practice charge with the NLRB against Consolidated "and/or" Trucking in which it contended that the employers discharged employees because of their activities on behalf of Local 20408 and other concerted, protected activities. The NLRB issued a Complaint and Notice of Hearing on August 29, 1978 with regard to the charge. Proceedings relating to the earlier-filed representation petition have been stayed indefinitely due to the issuance of the NLRB Complaint.[3]

(Footnote continued from preceding page)

the continuation of all such violations, and the cessation of harassment of covered workers. A further complaint filed by Local 102 on August 1, 1978, alleges a lock-out of workers and demands immediate reinstatement with back pay.

Local 102's complaints were originally directed against Trucking, as well as Consolidated and a third-party. However, at oral argument, respondent agreed to withdraw the name of Trucking as a party to the arbitration, since Trucking was not directly a party to the collective bargaining agreement.

[3] The Court notes that on August 4, 1978, Local 102 filed a charge with the Board against Local 20408, alleging that the other union had committed an unfair labor practice by picketing Consolidated to force its recognition when Consolidated had already lawfully recognized it. However, this charge was withdrawn approximately a week after it was filed.

Appendix B

Petitioner asserts that the issues to be arbitrated are the same as those before the NLRB in the representation and unfair labor practice proceedings brought by Local 20408 and that the NLRB has exclusive jurisdiction over these issues. It also argues that the Board would not defer to the abitrator's award in the instant case, as such award would not be consistent with NLRB principles and the National Labor Relations Act. Thus, according to Consolidated, failure to stay the arbitration will lead to costly and duplicative proceedings which could result in inconsistent adjudications, interfering with the orderly administration of the Board and exposing Consolidated to a possible conflict of penalties.

All of Consolidated's arguments must be rejected on the basis of the Supreme Court's decision in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964). In *Carey,* an electrical union, representing production and maintenance personnel, filed a grievance with an arbitrator, claiming that the employer, with whom it had a collective bargaining agreement, was violating the agreement by assigning unit work to employees in another unit represented by a different union. The employer refused to arbitrate on the ground that the controversy was a representation matter within the exclusive jurisdiction of the NLRB. The Supreme Court, reversing the decision of the New York Court of Appeals, held that whether the matter be characterized as a representation or as a work assignment dispute before the NLRB, it could also be adjudicated by the arbitrator under the collective bargaining agreement between the employer and the production and maintenance unit, which provided for the exclusive recognition of the electrical union. *See* 375 U.S. at 268, 272. The Court noted that because only one of the

two unions involved in the controversy was a party to the arbitration, the arbitrator's award might not terminate the dispute. *Id.* at 265. However, as the Court recognized, "the arbitration may as a practical matter end the controversy or put into movement forces that will resolve it." *Id.* Moreover, the Court continued, arbitration advances the statutory objective of promoting industrial peace and may help avoid fragmentation of the dispute, since the NLRB will defer to the arbitration award so long as the procedure was a fair one and the results were not repugnant to the Act. *See id.* at 270-72. The Court acknowledged that conflicting decisions could result should the NLRB choose to exercise its jurisdiction in an unfair labor practice or representation case rather than defer to the arbitrator's award. However, the Court held, such potential conflict should not restrict access to arbitration:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under §301. But that is not peculiar to the present type of controversy. Arbitral awards construing a seniority provision (*Carey* v. *General Electric Co.,* 315 F.2d 499, 509-510), or awards concerning unfair labor practices, may later end up in conflict with Board rulings. See *International Association of Machinists,* 116 N.L.R.B. 645; *Monsanto Chemical Co.,* 97 N.L.R.B. 517. Yet, as we held in *Smith* v. *Evening News Assn., supra,* the possibility of conflict is no barrier to resort to a tribunal other than the Board.

Id. at 272.

On the basis of *Carey,* it is clear that since the issues to be arbitrated in the instant case relate to an alleged breach of specific provisions of the collective bargaining agreement between Consolidated and Local 102,[4] the arbitrator is not preempted from adjudicating the dispute desipte the similarity between the issues before him and the NLRB. *See* 375 U.S. at 268, 272. *See also Smith* v. *Evening News Ass'n,* 371 U.S. 195 (1962).

Consolidated's arguments regarding the repercussions of the NLRB's refusal to defer to the arbitrator's award are no more persuasive. Its assertion that the NLRB will not defer to the arbitrator's award in this case is only speculative at this point. Moreover, as discussed earlier, *Carey* specifically recognized that in certain cases the NLRB would not defer to an arbitration award, and that in those cases the Board would rule on phases of the same dispute adjudicated by the arbitrator. *See id.* at 272. The Court held, however, that, in light of the strong policy favoring arbitration as a means of peacefully and expeditiously resolving disputes, the possibility of a conflict with a later NLRB ruling created no barrier to the resort to arbitration. *Id.* Consequently, Consolidated's argument that the arbitration should be stayed to avoid costly and repetitious proceedings and the possibility of inconsistent results must be rejected.

Petitioner's contention that the arbitration should be stayed to avoid subjecting it to a conflict of penalties must also be rejected. Like petitioner's claim that the NLRB will not defer to the arbitrator, this argument is conjectural, and thus premature, since neither the arbitrator nor the Board has yet ruled. *Cf. Carey* v. *General*

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[4] *See* note 2 *supra* and accompanying text.

Electric Co., 315 F.2d 499, 512 (2d Cir. 1963). Moreover, at this point the Court is not persuaded that the nature of the issues before the respective tribunals actually creates the potential for subjecting Consolidated to conflicting penalties. Furthermore, it is well established that in the event of any conflict in ruling between the Board and the arbitrator, the Board's ruling would take precedence. *See Carey* v. *Westinghouse Electric Corp., supra,* 375 U.S. at 272.

Consolidated attempts to discredit *Carey* by arguing that the Supreme Court's decision was based upon the NLRB's determination in *Raley's Inc.,* 143 N.L.R.B. 256 (1963), which, it contends, has now been overruled. However, whether or not *Raley's* is still good law is immaterial to the result in the present case. The Supreme Court's reliance on *Raley's* in *Carey* was limited to a discussion in footnote regarding the circumstances under which the NLRB will defer to an arbitration award. As this Court has already noted, however, the *Carey* opinion recognized that there could be instances in which the NLRB would not defer to the arbitrator; yet, the therapeutic and conciliatory environment of that informal forum justified its use. *See* 375 U.S. at 272. Thus, whether or not the standards for Board deference to an arbitrator applied in *Raley's* are still operative has no relevance to *Carey's* continued viability under the facts of this case. Consolidated also argues that *Carey* has been undercut by the Second Circuit's opinion in *McGuire* v. *Humble Oil & Refining Co.,* 355 F.2d 352 (2d Cir.), *cert. denied,* 384 U.S. 988 (1966), in which the court refused to enforce an arbitration clause. *McGuire* v. *Humble Oil* is readily distinguishable from *Carey* and the instant case, however, because prior to the Court's decision in that case, the

NLRB had issued a ruling which would take precedence over the arbitration award. *See* 355 F.2d at 356-58. Hence, the Court is not persuaded that either the possibly discredited status of *Raley's*[5] or the Second Circuit's opinion in *McGuire* v. *Humble Oil* affects the application of the *Carey* decision to this case.

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[5] The Second Circuit recently commented on the continued viability of *Raley's, Inc.* and its relationship to *Carey* as follows:

> We do not think it profitable to engage in lengthy discussion of decisions, notably *Raley's Supermarkets,* 143 NLRB 256 (1963), where the Board has "deferred" to the awards of arbitrators in "accretion" cases. See *NLRB* v. *Horn & Hardart Co.,* 439 F.2d 674, 679 (2 Cir. 1971). The Board seems to have become rather disenchanted with *Raley's.* See e.g., *Woolwich, Inc.,* 185 NLRB 783 (1970); *Patterson-Sargent Division of Textron, Inc.,* 178 NLRB 1290 (1968); *Beacon Photo Service, Inc.,* 163 NLRB 706 (1967); *Combustion Engineering Inc.,* 195 NLRB 909 (1972); and particularly *Hershey Foods Corp.,* 208 NLRB 452 *enf'd memorandum* (3 Cir. 1974) (not reported officially) where the Board affirmed the rulings of its ALJ, who had noted that the *Raley's* case "preceded the line of cases cited above in which the Board had declined to defer to arbitral awards where accretion is in issue. The later cases must thus be deemed to supersede *Raley's* . . . if regarded as inconsistent therewith." *Id.* at 457. Although the Supreme Court noted *Raley's* with apparent approval in *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261, 270 n.1, 84 S. Ct. 401, 11 L.Ed.2d 320 (1964), it made it clear that the deference to arbitration in unit cases was not to be a blind one, 375 U.S. at 272, 84 S. Ct. 401; and ultimately the Board declined to defer to the arbitrator's findings in that very case. *Westinghouse Electric Corp.,* 162 NLRB 768 (1967).

Long Island College Hospital v. *NLRB,* 566 F.2d 833, 845 n.5 (2d Cir 1977), *cert. denied,* 46 U.S.L.W. 3665 (U.S. April 25, 1978).

Appendix B

Petitioner has advanced one further ground for a stay. After oral argument in this case, it filed a charge against Local 102 with the NLRB in which it alleged that by demanding arbitration while there was a representation issue before the Board, Local 102 had committed an unfair labor practice. Consolidated argues that the pendency of the unfair labor practice charge before the Board ousts this Court of jurisdiction to entertain respondent's cross-motion to compel arbitration. In addition, according to petitioner, an order to arbitrate would nullify Consolidated's rights to exercise its remedies under the National Labor Relations Act, since the very act of instituting an arbitration constitutes a violation of that statute. As the Court has been informed by Mr. Elbert Tellem, Assistant Regional Director of the NLRB, that this charge was administratively dismissed on September 18, 1978, it can reject petitioner's last argument without dwelling on its merits.

For all of the foregoing reasons, Consolidated's motion to stay arbitration is denied, and Local 102's cross-motion to compel arbitration is granted.

It is so ordered.

Dated: New York, New York
September 25, 1978

ROBERT J. WARD
U.S.D.J.

Appendix B

Judgment of Robert Ward, D.J. Dated October 16, 1978

(Filed: October 16, 1978)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 3756 (RJW)

In the Matter of the Arbitration Between

CONSOLIDATED CARRIERS CORP. and/or
TRUCKING PERSONNEL, INC.,

Petitioner,

—against—

CLOAK DRESS DRIVERS AND HELPERS UNION LOCAL 102,
INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondent.

The Court by order herein dated September 25, 1978, having denied the petitioner's motion to stay arbitration and having granted respondent's cross-motion to compel arbitration herein; it is

ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of respondent denying petitioner's motion

Appendix B

to stay arbitration and granting respondent's cross-motion to compel arbitration.

Dated: October 16, 1978.

ROBERT J. WARD
United States District Judge

The undersigned does not object to the form of the foregoing proposed judgment.

MARCHI JAFFE COHEN CRYSTAL & MINTZ
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APPENDIX C

Decision and Direction of Election of the National Labor Relations Board

RD #3-79
Jersey City, New Jersey
New York, New York

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SECOND REGION

Case No. 22-RC-7461

G. S. SUPPLY ASSOCIATES, INC. and G. S. TEMPORARY SERVICES, INC. and INTERSTATE DRESS CARRIERS, INC.[1]

Employer

and

UNION LOCAL 20408 OF THE UNITED WAREHOUSE, INDUSTRIAL AND AFFILIATE TRADES EMPLOYEES' UNION

Petitioner

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[1] The name of the Employer appears as amended at the hearing. Garment Trucking Association of New Jersey Inc. and New York and New England Dress Carriers Association, Inc., referred to herein as the Intervenor-Employers intervened on the basis that Interstate Dress Carriers, Inc. is a member of said employer associations, which in turn are parties to a multi-employer collective bargaining agreement with Local 102, Cloak and Dress Drivers and Helpers Union, International Ladies Garment Workers Union, AFL-CIO, (herein Local 102), which they contend is a bar to an election in the petitioned for unit. Local 102 also intervened on the basis of said contract.

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Upon a petition[2] duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Michael Lightner and Susan K. Anderson, hearing officers of the National Laobr Relations Board.

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[2] The Petition and First Amended Petition herein were filed on April 5, and April 14, 1978, respectively, and sought a unit including all production and maintenance employees including truck drivers, helpers and warehousemen employed by the Employer at Interstate Dress Carriers, Inc.'s, (herein I.D.C.) 265 Broadway, Jersey City, New Jersey location, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. On July 19, 1978, a Second Amended Petition was filed to include the employees employed by the Employer at I.D.C.'s New York, New York facilities, which are four in number. I.D.C. and Local 102 both contend that the large increase in the unit petitioned for, i.e., from one location to five locations and from approximately 50 employees to approximately 300 employees (these are the numbers of employees as established at the hearing not as set forth in the petition and amended petitions) warrants the treatment of the second amended petition as a new petition and the exclusion of all evidence relating to events prior to its filing. I find this argument to be without merit. In this regard, I find that *Hyster Company*, 72 NLRB 937 (1947) and other cases cited in support of this contention are distinguishable from the instant case in that they hold that for contract bar purposes if an amended petition, which substantially enlarges the previously petitioned for unit, is filed subsequent to the execution of a contract, it will be treated as a new petition, and therefore subject to the bar, even if the original petition predated the execution of said contract. This is clearly not controlling of the instant case where the Petitioner concedes that neither its original petition or the subsequent amendments were timely filed with respect to the termination date of the applicable contract, but rather, that said contract is not a bar as it has been applied as a "members-

(Footnote continued on following page)

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Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[3]

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only" agreement. I further note that in *Herff Jones Company*, 97 NLRB 1070 (1952), the Board held that where a contract was amended subsequent to the filing of an amended petition that substantially enlarged the petitioned for unit, that said amended petition would be treated as a new petition for contract bar purposes and the amended contract would be the proper document against which to measure the contract bar argument. However, this did not insulate the amended contract from scrutiny as to whether it was a "members-only" agreement nor did it limit the scope of the inquiry to events postdating the date of filing of the amended petition.

[3] Subsequent to the close of the hearing, Local 102 filed a motion urging that the instant case be transferred to the Board or in the alternative to the Second Region for "hearings de novo", as the undersigned had prejudged the joint employer issue herein. As a basis for its allegations, Local 102 cites that on August 31, 1978, the undersigned issued a Complaint against Local 102 and the Employer herein in an unfair labor practice proceeding, Cases Nos. 22-CA-8571, 22-CA-8572 and 22-CB-3876, in which it was alleged that I.D.C., G.S. Supply Associates, Inc. (herein G.S. Supply) and G. S. Temporary Services, Inc. (herein G.S. Temporary) constitute a single employer within the meaning of the Act, and that the General Counsel of the Board, in Case No. 78-CR-496, a criminal proceeding arising out of an alleged attempt by Local 102 and others to obstruct the instant proceeding, has in a brief filed with Judge Henry Bramwell of the United States District Court for the Eastern District of New York, referred to said portion of the Complaint as a "finding". I find the Motion to be without merit. Pursuant to Sections 10(b) and 3(d) of the Act, the Regional Director, on behalf of the General Counsel, has the authority to issue unfair

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Upon the entire record[4] in this proceeding, the undersigned finds:

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labor practice complaints, as I have done in the above-captioned unfair labor practice matter. Pursuant to Section 3(b) of the Act, the Regional Director issues decisions in representation matters on behalf of the Board, as I will do in the instant matter. These are two different and distinct functions. The issuance of an unfair labor practice complaint is based on a finding, that as the result of an administrative investigation, there is reasonable cause to believe that an unfair labor practice has been committed. A decision in a representation matter, however, requires not a finding of reasonable cause based on administative investigation, but rather a finding of the actual existence of a fact, based on record testimony developed by all of the parties at a hearing. My finding of sufficient facts to warrant a finding of reasonable cause in the above-captioned unfair labor practice matter does not constitute prejudgment of the same issue in a subsequent representation matter. In this regard, I further note, that if Local 102's argument had merit it would either allow the commission of unfair labor practices to go uninvestigated until the completion of representation proceedings or require the Board itself to make original decisions in all representation case matters where simultaneous unfair labor practice charges are filed. This certainly was not the intent of Congress when it enacted Section 3(b) of the Act. See *Magnesium Casting Company* v. *N.L.R.B.*, 401 U.S. 137, 76 LRRM 2497, 2498 (1971). Accordingly, I hereby deny Local 102's motion to transfer.

[4] Briefs filed by I.D.C., Local 102 and the Petitioner have been fully considered.

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1. The hearing officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed.[5]

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[5] I note in particular that the hearing officer denied I.D.C.'s motion to adjourn the instant proceeding until the completion of the above-mentioned criminal proceeding. As a basis for said motion, I.D.C., which, along with its corporate official Sidney Lieberman, and others, is charged with endeavoring to obstruct the instant proceeding, argued that it would be deprived of due process of law if it were forced to go forward in the instant matters as said Sidney Lieberman, the person in charge of its corporate labor relations, has indicated to it through his counsel that he would not testify at the instant proceeding as it might tend to incriminate him. In an attempt to enjoin the instant proceeding, I.D.C. had made the same argument before Judge Bramwell and he rejected it. The undersigned also rejects I.D.C.'s contention in this regard for the reasons set forth in Judge Bramwell's learned opinion. I further note that I.D.C. declines to even call Lieberman as a witness or to require him to provide any documents. It is well established that as the privilege against self-incrimination applies only to personal papers and not to corporate documents, see *Wilson* v. *United States,* 221 U.S. 361 (1911), that Lieberman could have been required to produce any corporate documents that I.D.C. felt would be helpful to its case but it declined to even attempt to do so. As to Lieberman's possible testimony, as noted by Judge Bramwell at p. 8 of his opinion, "the privilege against self-incrimination may not be asserted in advance of questions actually propounded. Blanket refusals to answer based upon the privilege are unacceptable." This however is exactly what I.D.C. permitted Lieberman to do as it never called him to testify. Judge Bramwell, at p. 9, also stated that "Mr. Lieberman may find himself able to testify as to certain matters without fear of self-incrimination." This is something that will never be known as I.D.C. chose not to call Lieberman as a witness. I.D.C. cannot successfully argue that it was denied due process because Lieberman's testimony was essential to its case and it was forced to go forward without it, when it has not established, indeed, it has not even made an effort to establish, that Lieberman could lawfully invoke his privilege as to said testimony or that he would even do so.

2. I.D.C. is a New York corporation engaged in the business of transporting goods in interstate commerce by motor truck and performing related services at its various locations in the states of New York, New Jersey, Pennsylvania and Florida. The parties stipulated that during the preceding 12 months, in the course and conduct of its business, I.D.C. derived revenue in excess of $50,000 from said operations and that it derived revenue in excess of $50,000 from performing said operations for various enterprises each of which in turn annually produces and ships goods valued in excess of $50,000 directly to states of the United States other than the state in which they are respectively located. Based upon the stipulation of the parties and the record as a whole, I find that I.D.C. is an Employer within interstate commerce and subject to the Board's jurisdiction pursuant to Sections 2(2), 2(6) and 2(7) of the Act.[6]

I.D.C. has approximately 12 facilities located in the States of New York, New Jersey, Pennsylvania and Florida. It employs approximately 950 employees at these locations. Its terminals at 265 Broadway, Jersey City, New Jersey and its four New York City locations, 107 West 37th Street, 247 West 35th Street, 515 West 35th Street and 155 West 35th Street[7] are the subject of the instant petition and approximately 300 employees are employed there as drivers,[8] handlers, helpers and mechanics. Five of I.D.C.'s Pennsylvania facilities, i.e. Bath, Lehighton, Meyerstown, Somerset and Wilkes Barre are represented by unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein I.B.T. There are approximately 630 employees at these locations. I.D.C.'s remaining facility in Pennsylvania has a complement of approximately 15 employees and is represented by Local 102. I.D.C.'s Florida facility has approximately 5 employees, none of whom apparently are represented by a labor organization.

[6] See *HPO Service, Inc.*, 122 NLRB 394 (1958).

[7] This facility was also referred to in the record as 463 7th Avenue.

[8] Drivers are also referred to as chauffeurs. The terms are apparently interchangeable and refer to individuals who drive I.D.C.'s trucks at the various facilities.

G. S. Supply and G.S. Temporary are New York corporations, which at the time of the filing of the petition herein, were in the business of supplying temporary help and business services to business firms. Irving Brotman and Hazel Johnson are the sole stockholders, officers and directors of the two corporations. They exercise control over the labor relations and day-to-day activities of both corporations. The corporations share the same office, have the same office staff, use the same accountant and maintain a single workmen's compensation insurance policy covering the employees of both. I find that as the two corporations have common owners, officers and directors and that as said common owners, officers and directors exercise control over both the labor relations and day-to-day activities of both corporations that G.S. Supply and G.S. Temporary are a single employer.[9]

G.S. Supply was incorporated in April of 1976. Prior to that, Irving Brotman was an employee of Hourly

[9] See generally, *Marine Welding and Repair Works, Inc.*, 174 NLRB 661, 665 (1969), and cases cited therein, enfd. in relevant part, 439 F. 2d 395, 76 LRRM 2660, 2661-2662 (8th Cir. 1971).

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Helpers Incorporated, another firm in the business of providing temporary employees. I.D.C. was one of Hourly Helpers clients while Brotman was employed there. Soon after its incorporation, G.S. Supply acquired I.D.C. as a client. This occurred in July 1976, and the initial complement of employees it referred to I.D.C. numbered approximately 50. G.S. Supply and I.D.C. had an oral agreement, apparently terminable at will by either party, calling for I.D.C. to reimburse G.S. Supply for all payroll expenses plus a 1% profit. In October 1976, I.D.C. requested that G.S. Supply "do a payroll for them" i.e., place approximately 50 of its employees on G.S. Supply's payroll. These generally were employees hired by I.D.C., not employees referred by G.S. Supply. G.S. Temporary was incorporated in May 1977. This was done on the advice of G.S. Supply's accountant "for tax purposes" so that the permanent employees at I.D.C. could be segregated from the temporary employees, some of whom were also referred to other employers.[10]

[10] G.S. Supply and G.S. Temporary did business with approximately 17 other clients from the date of their incorporation until July 1978, when they ceased operations. Before the incorporation of G.S. Temporary, approximately 80% of the business of G.S. Supply was with I.D.C. After the incorporation of G.S. Temporary, G.S. Supply dealt solely with I.D.C. G.S. Temporary assumed the business of referring temporary employees, both to I.D.C. and to G.S. Supply's other clients. At the time of the filing of the petition herein it was referring approximately 100 employees to I.D.C. and this constituted approximately 80% of its business. Of these, approximately 30 were also working for I.D.C. on a permanent basis. Neither group of employees was referred to any I.D.C. location other than the petitioned for five locations. The employees of G.S. Supply were primarily drivers, those of G.S. Temporary consisted of drivers, helpers and handlers but were primarily in the latter two classifications.

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I.D.C. had virtual total control of the employees which it placed on the G.S. Supply payroll. I.D.C. hired them, I.D.C. tested the ability of the drivers, I.D.C. alone supervised and directed their work,[11] I.D.C. alone determined their hours of work, salary and benefits, and reimbursed G.S. Supply for all payroll costs, and I.D.C. alone had the authority to discipline the employees and terminate their employment.[12] Other than maintaining their workmen's compensation insurance, the only function served by G.S. Supply as to these employees was computing their salary, making the deductions for them as required by law, and delivering their paychecks to them. All of these employees punched a time card at I.D.C. and were provided with medical insurance coverage by I.D.C.

I.D.C., alone, also totally supervised the work of the G.S. Temporary employees; it alone determined their hours of employment, salary and benefits and reimbursed G.S. Temporary for all payroll costs; it also had the right to discipline the employees and discharge them. G.S. by refusing to refer them out if they were unfit for work Temporary hired the employees and could "discipline" them because of intoxication. It also maintained their workmen's compensation insurance. These employees were paid on the basis of "slips" or "tickets" that would be filled out and signed by an I.D.C. foreman and which set forth how many hours the employees in question worked.

[11] Indeed, neither G.S. Supply or G.S. Temporary even had any supervisory level employees at any of the I.D.C. locations.

[12] Irving Brotman testified that he had, on two occasions, "fired" employees whom I.D.C. had placed on the G.S. Supply payroll. Further examination of his testimony reveals, however, that he merely informed I.D.C. that he no longer wanted the employees in question to be on the G.S. Supply payroll and that this action did not necessarily lead to their discharge by I.D.C.

The above evidence clearly establishes that, as to the employees on the G.S. Supply payroll at the time of the petition herein, both G.S. Supply and I.D.C. took part in determining matters governing essential terms and conditions of their employment. I.D.C. hired them, totally controls their hours of employment, rate of pay and benefits, supervises them in their work and exercises discipline over them up to and including discharge. G.S. Supply computes their wages based on records kept by I.D.C. and makes the deductions from their pay required by law. G.S. Supply also maintains their workmen's compensation insurance. Accordingly, I find that G.S. Supply and I.D.C. were, at the time of the filing of the petition herein, joint employers of all the employees including drivers, helpers and handlers on the G.S. Supply payroll and working at the five I.D.C. locations that are the subject of the instant petition.[13]

I further find that the record clearly establishes that both G.S. Temporary and I.D.C. take part in determining matters governing essential terms and conditions of the employees on the G.S. Temporary's payroll and working at the I.D.C. location. G.S. Temporary hires them, can refuse to refer them, makes deductions for them as required by law and maintains their workmen's compensation insurance. I.D.C. supervises their work, their hours, rate of pay and benefits, and has the right to discipline them and terminate their employment. Accordingly, I find

[13] See *Manpower, Inc. of Shelby County and Armour Grocery Products Co., Division of Armour and Company,* 164 NLRB 287 (1967). See also, *The Greyhound Corporation and Floors Inc. of Florida,* 153 NLRB 1488 (1965) enfd. 368 F.2d 778, 63 LRRM 2434 (5th Cir. 1966).

that G.S. Temporary and I.D.C. were at the time of the filing of the petition herein joint employers of all the employees, including drivers, handlers and helpers, on the G.S. Temporary payroll and working at the five I.D.C. locations that are the subject of the instant petition.[14]

However, I also find that shortly after the filing of the petition herein, I.D.C. returned to its payroll the employees that it had previously placed on the G.S. Supply payroll and hired and placed on its payroll the employees that were being referred to it by G.S. Temporary, so that as of approximately late April or early May 1978, G.S. Supply and G.S. Temporary ceased to be joint employers of these individuals and I.D.C. became their sole employer.[15] Indeed, G.S. Supply and G.S. Temporary have in fact ceased operations in June and July, 1978, respectively and are no longer employing entities. In light of the above, I shall omit them from the Direction of Election set forth *infra.*

3. The labor organizations involved claim to represent certain employees of the Employer. The parties have stipulated and I find that Local 102 is a labor organization within the meaning of Section 2(5) of the Act.

[14] See cases cited at note 13, *supra.*

[15] The record also reflects that there were perhaps as many as 50 employees of other temporary employment services working at the instant five I.D.C. facilities when the instant petition was filed. There is no contention of joint employer status of I.D.C. concerning these individuals. However, the record indicates that during this time period I.D.C. also hired these employees and placed them on its payroll as well.

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I.D.C. and Local 102 both contend that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act.[16]

The record reflects that the Petitioner, is an organization in which employees participate. In this regard it is noted that the Petitioner conducts meetings which employees attend and that employees elect its officers. It is further noted that Willie Davis, an officer of the Petitioner, is himself an employee of one of the employers with whom the Petitioner has a collective bargaining relationship.

The record also establishes that the Petitioner exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. In this regard, it is noted that the Petitioner has had a collective bargaining relationship with an employer for a period of years and that it has recently concluded negotiations for a collective bargaining agreement with a second employer.

In addition, I note that the Petitioner has in the past been found by the Board to be a labor organization.[17]

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[16] That section provides: The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

[17] *See Robert L. Boyle, Annie Egner, Catherine B. Kip, Estate of Regina T. Boyle, a co-partnership t/a John P. Boyle Company,* 222 NLRB, 1309, 1311 (1976).

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I.D.C. and Local 102 contend that the Petitioner is not a labor organization within the meaning of the Act, based on their allegations that its President, Matthew Eason, has been engaged as a labor consultant while serving as an officer of the Petitioner and has received monetary payments for withdrawing a petition involving another Employer. I.D.C. and Local 102 are alleging in effect that the Petitioner is a "corrupt" union and as such should not be allowed to participate in Board processes. The Board, however, has long held that whether a union is a "good" union or a "bad" union is a question for the employees to decide when they cast their ballot and that it does not possess the authority to deny a union access to its proceedings because of alleged violations of other statutes.[18]

I.D.C. and Local 102 also contend that the Petitioner is not a labor organization because the election and/or term of office of several of its officers was not in accordance with its constitution. The Board, however, has long held that internal union matters are not determinative of labor organization status.[19]

I.D.C. and Local 102 further allege that the Petitioner is an instrumentality of the Department of Justice and provides that organization with evidence and assistance in criminal prosecutions. The Board, however, has held that even an allegation that a union is an instrumentality of

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[18] See *Alto Plastics Manufacturing Corporation,* 136 NLRB 850 (1962), cited with approval; *Whittlesea Checker Taxi Inc.,* 237 NLRB No. 156 at slip op. p. 5 (1978).

[19] See generally *Silvino Giannasca d/b/a Imperial Reed & Rattan Furniture Co.,* 117 NLRB 495 (1957).

organized crime is not sufficient to warrant a finding of its not being a labor organization where it meets the statutory requirements for same.[20]

In light of all the above, and the record as a whole, I find that the Petitioner is an organization in which employees participate and which exists in whole or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Accordingly, I find that it is a labor organization within the meaning of Section 2(5) of the Act.

I.D.C. and Local 102's final argument is that even if the Petitioner is a labor organization within the meaning of the Act it should not be allowed to participate in Board processes as it is not a "bona fide" collective bargaining representative, citing *International Brotherhood of Service Station Operators of America (Urich Oil Company)* 215 NLRB 811 (1974). In that case the Board held that although a union was a labor organization as defined in the Act, as it was unwilling or unable to represent employees fairly, impartially or in good faith that it was not a "bona fide" collective bargaining representative and its entering into a contract to represent employees violated the Act. All this occurred in an unfair labor practice context, however, and is clearly not applicable to the instant issue, i.e., whether a union can be barred from participation in a Board election. More to the point, although not controlling of the instant case because of factual distinctions, is *Douglas Oil Company* 197 NLRB 308 (1972), cited by the Board in *Urich Oil Company, supra.*

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[20] See *Hotel Properties Inc. d/b/a The Landmark Hotel and Casino,* 194 NLRB 815 (1972).

In *Douglas Oil Company,* which also involved the International Brotherhood of Service Station Operators of America, the Board revoked a certification and dismissed two petitions on the basis that the union was ". . . in reality something other than a collective bargaining representative" (*Douglas Oil Company, supra* at 311). In this regard the Board noted that the union had been founded by employers in the same industry as the Employers with whom it sought to bargain, that its officers were employers in that industry and that these officers, while serving in union office, had *as employers* executed collective bargaining agreements with the union. As precedent for its decision the Board cited *McDonalds of Canoga Park, Calif. Inc.* 162 NLRB 367 (1966), which in turn primarily relies on *Baush & Lomb Optical Company* 108 NLRB 1555 (1954). The reasoning of this line of cases is that the Board will not accord bargaining representative status to a labor organization whose own interest, because of its ties to employers, are in conflict with its obligations as collective bargaining representative of employees. In the instant case, I.D.C. and Local 102 have not alleged that any conflict of interest exists between the Petitioner's own interests and its future obligations should it be certified as the collective bargaining representative of the employees in question, nor is there evidence of any such conflict. In this regard, I note there is no evidence that the Petitioner is a business rival of I.D.C., that any officer or official of the Petitioner is an employer in the same industry as I.D.C. or any other industry, or has any type of controlling interest or high level managerial position with an employer in the same industry as I.D.C. or with any other employer. Accordingly, I find that the Petitioner is a "bona fide" collective

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bargaining representative and entitled to participate in Board processes.

4. I.D.C. contends that the collective bargaining agreement between Local 102 and five multi-employer associations,[21] two of which[22] it is a member of, and to which it had delegated authority to negotiate said contract, is a bar to the proceeding. Local 102 and both of the Intervenor-Employers join in this contention. The contract was executed on November 16, 1976 and is effective from February 1, 1976 up to and including May 31, 1979. The collective bargaining unit consists of all chauffeurs, drivers, handlers, helpers, mechanics (Class A), mechanics (Class B), mechanics' helpers and mechanics' apprentices employed by all members of the five associations.

The Petitioner concedes that its petition is not timely filed within the 90 to 60 day period before the expiration date of the contract and that the contract is not a "members-only" agreement on its face. It contends, however, that the contract has been applied on a "members-only" basis at the five I.D.C. locations that are the subject of the instant petition and, therefore, that it is not a bar as to these locations.

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[21] *Master Truckmen of America Inc., Cloak and Suit Trucking Association, Inc., Garment Trucking Association of New Jersey Inc., Associated Dress Carriers of Brooklyn & Queens, Inc., New York and New England Dress Carriers Association, Inc.* In total, these five associations consist of upwards of 180 individual employers.

[22] I.D.C. has been a member of the Garment Trucking Association of New Jersey Inc. since approximately 1961. It has been a member of the New York and New England Dress Carriers Association, Inc. since approximately 1970.

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As noted above, beginning in October, 1976, and continuing through late April or early May, 1978, I.D.C. placed approximately 50 of its employees on the payroll of G.S. Supply. However, it retained sole control over the rates of pay and the benefits to be provided to these employees. The same is true of the G.S. Temporary employees, that is, I.D.C. alone determined their wages and benefits. Despite this, the record clearly reflects that none of these employees received the contractual wages and benefits but rather that only the employees who were members of Local 102 did so. The contract calls for a wage of $192 per week to be paid to drivers as of June 6, 1976. This rate increased to $200 per week as of June 6, 1977. The record testimony reveals that while members of Local 102 were receiving these rates during these time periods, the drivers on the G.S. Supply and G.S. Temporary payroll were receiving anywhere from $120 to $160 per week. The helpers. and handlers were to earn $182 and $149 per week, respectively, as of June 6, 1976 and $190 and $157 per week, respectively, as of June 6, 1977. The record evidence reflects that members of Local 102 did, in fact, receive this rate but that the helpers and handlers paid through G.S. Supply and G.S. Temporary received only the minimum wage required by law. As to benefits, the contract provides that employees shall receive twelve paid holidays and the record reflects that members of Local 102 received this benefit. The record further reflects that the employees on the G.S. Supply payroll received only four paid holidays and that the employees on the G.S. Temporary payroll received none at all. Additionally, the contract provides that employees are entitled to two weeks paid vacation after one year of work and that this increases to three weeks

after two years. The record reflects that those employees who were members of Local 102 received this benefit. It further reveals that the employees on the G.S. Supply payroll received only one week of paid vacation after one year's employment and that this did not increase despite additional years of service. The G.S. Temporary employees did not receive paid vacations. The contract provides that certain sums of money are to be paid for each employee to a health fund on a weekly basis. The fund, in turn, provides medical, optical and dental insurance coverage for the employees and their families. The record reflects that this coverage was provided for employees who were members of Local 102. It further reflects that the employees on the G.S. Supply payroll received only medical insurance coverage for themselves, that this came through I.D.C. indirectly and that it did not cover their families. The employees on the G.S. Temporary payroll did not receive any medical insurance benefits.

These facts conclusively establish that the contract has been applied in a "members-only" fashion. They are even more convincing in light of the testimony of employee witnesses that as soon as they became members of Local 102 their salary and benefits were increased to the contract levels.

In response to this, I.D.C. contends that it was not required to apply the contract to the employees on the G.S. Supply and G.S. Temporary payrolls as they were not its employees and therefore the lack of application to these employees cannot be used as a basis for finding a "members-only" agreement. I reject this line of reasoning. As I have found above, I.D.C. not only was a joint employer of these individuals but as such retained sole control of their rates

of pay and benefits. This, coupled with the fact that I.D.C. was the moving force behind the original placement of 50 of its employees on the G.S. Supply payroll, its apparent "arrangement" with Local 102 by which approximately 5 employees per month would be transferred from one of the G.S. payrolls to its payroll and become members of Local 102 and the speed with which it added employees to its payroll subsequent to the filing of the petition, all belie I.D.C.'s claim of lack of control of the terms and conditions of employment of these employees. Nor can I.D.C. find solace in a claim that these employees were temporary and therefore not covered by the contract. In this regard, I note that the record establishes that from October 1976 forward, all of the employees on the G.S. Supply payroll were working for I.D.C. on a permanent basis and that a large percentage of the G.S. Temporary employees were also permanent employees. I also note in particular, that Article 39 of the collective bargaining agreement provides that temporary employees ". . . shall be deemed covered workers under this agreement. They shall be paid not less than the minimum provided for herein . . ." and that none of the G.S. Supply or G.S. Temporary employees were paid at even this schedule.[23]

As a final matter, I note that the record indisputedly establishes that the employees on the G.S. Supply and G.S. Temporary payrolls performed the identical work, side by side with the employees on the I.D.C. payroll who

[23] This schedule provides that starting June 6, 1976, drivers, helpers and handlers would be paid $174, $164 and $149 per week, respectively, and that this would increase to $182, $172 and $157 per week starting June 6, 1977.

were members of Local 102, under the direction of the same I.D.C. supervisors and that this work is within the unit description of the instant collective bargaining agreement. Accordingly, I find that there is no question that the employees on the various G.S. payrolls were within the scope of the contractual bargaining unit.[24]

Local 102 admits that it was aware that the employees on the various G.S. payrolls were doing the same work as the I.D.C. employees and receiving neither the wages nor the benefits required by the contract,[25] but claims that it was not able to act to correct the situation because it was fearful that an adverse arbitration decision on the matter would open the door for other employers to act in the same manner. Even if truthful, this does not alter the inescapable conclusion that the contract was applied on a "members-only" basis and as such cannot be a bar to an election. I am constrained to add, however, that given the celerity in which these employees were added to

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[24] Compare, *Peter Kiewit Sons Co.*, 231 NLRB No. 13, at slip op. p. 8 (1977).

[25] In this record it is noted that Theodore Theus, the assistant manager of Local 102, and an agent of Local 102 within the meaning of Section 2(13) of the Act, was called as a witness by Local 102 and testified that his predecessor as assistant manager, James McMichaels had knowledge of the situation at I.D.C. for a period of months (if not years) prior to April 1978. I further note that several employees, some of them shop stewards of Local 102, testified that since 1976 they had complained to McMichaels about the situation at I.D.C. and that his only response was that he could only get a few men per month into the union and that they would have to wait their turn.

I.D.C.'s payroll and became members of Local 102[26] and Local 102's sudden emergence as a "champion" of their rights through the medium of seeking arbitration over their years long deprivation of salary and benefits,[27] all coming close on the heels of Local 20408's petition, make Local 102's explanation extremely difficult to accept. Indeed, in light of Local 102's documented past history of failing to represent a unit of employees employed by another member of the Intervenor-Employer, Garment Trucking Association of New Jersey Inc.,[28] I find its position to more likely be a complete fabrication. It appears that Local 102 has now decided, in an apparent effort to save its represenative status from challenge, to represent all of the instant employees equally. Its efforts

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[26] A document prepared by Local 102 was entered into evidence by the Petitioner. It is dated September 20, 1978 and sets forth the Local 102 members employed by I.D.C. and their initiation dates. This document reveals that Local 102 had approximately 90 members employed at the five locations in question herein prior to the filing of the instant petition. Subsequent to the filing of the petition it added 5 members in April, 83 in May and 114 in June.

[27] In an affidavit filed on September 25, 1978 with Judge Bramwell, in a proceeding initiated by I.D.C. to enjoin said arbitration, Counsel for Local 102 stated that he had conducted an investigation involving approximately 67 employees and that it had revealed "wholesale underpayments of wages" and "unpaid benefit contributions . . . since the commencement of the contract". He estimated that approximately 240 of the approximately 300 present I.D.C. employees had been affected by these contract violations and that the monetary damages from same would total upwards of $1,750,000.

[28] See *Tri-State Transportation Company, Inc.*, 179 NLRB 310, 311 (1969).

are in vain. I find herein, as did the Board in *Tri-State Transportation Company, Inc.,* that:

> ". . . it is clear that any efforts by Local 102 to apply its contract to these employees occurred only after the Petitioner sought to represent them, and that they were not, in fact, represented when the petition was filed. Under these circumstances, . . . Local 102's belated attempt to apply its contract does not establish the existence of a stabilizing labor agreement which bars a representation election . . ."[29]

In light of all the above, and the record as a whole, I find, while the contract alleged as a bar herein is not a "members-only" agreement on its face, that it has not been equally applied to all employees and Local 102 has never, in fact, represented all of the employees equally and without discrimination between union and nonunion members. Accordingly, the contract cannot serve as a bar to the instant petition.[30] I find, therefore, that a question affecting commerce exists concerning the representation of the employees of I.D.C. within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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[29] *Tri-State Transportation Company, Inc., supra,* at 311.

[30] I.D.C. and Local 102 argue that as the instant contract is not a "members-only" agreement on its face, nor is it in any way ambiguous in this regard, that extrinsic evidence cannot be introduced to show that it has been applied on a "members-only" basis. I reject this contention, as it is contrary to the controlling precedent. See *Bernard, Saul and Harry Sumergrade d/b/a N. Sumergrade & Sons,* 121 NLRB 667, 669 (1958).

5. As clarified at the hearing, Petitioner seeks a unit of all chauffeurs, drivers, helpers, handlers, class A mechanics, Class B mechanics, mechanics' helpers, and mechanics' apprentices[31] jointly employed by I.D.C., G.S. Supply, and G.S. Temporary at I.D.C.'s 265 Broadway, Jersey City, New Jersey, 107 West 37th Street, New York, New York, 515 West 35th Street, New York, New York, 247 West 35th Street, New York, New York and 155 West 35th Street, New York, New York locations but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act. The other parties agree to the composition of the unit but contend that it is too limited in scope to constitute an appropriate unit.

In this regard, I.D.C., Local 102 and the Intervenor-Employers contend that the only appropriate unit is a multi-employer unit encompassing all of the employers within the five associations that are signatory to the 1976 agreement, or in the alternative, at least encompassing all of the employers within the two associations of which I.D.C. is a member. I find this argument to be without merit. In this regard I note that the Board has long held that a single employer unit is presumptively appropriate and that a controlling history of collective bargaining on a broader basis must be shown in order to rebut said presumption.[32] I have found that the collective bargain-

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[31] The parties are in agreement that groups of employees referred to in the record as "checkers", "push boys" and "rack men" are eligible employees within the included classifications of this unit description.

[32] *Chicago Metropolitan Home Builders Association,* 119 NLRB 1184, 1185 (1957).

ing history involving I.D.C. has been on a "members-only" basis and therefore it cannot be deemed controlling.[33] Moreover, I note that there is no evidence of, nor has any party alleged any factors that would remove the aforementioned contract as a bar as to the other employers within the various associations. In light of all the above, I find that the single-employer unit sought by the Petitioner is appropriate.

It is unclear whether I.D.C. and Local 102 also contend that I.D.C.'s Philadelphia, Pennsylvania terminal, which employs approximately 15 employees within the agreed upon unit classifications, should also be included within the appropriate unit.[34] The Petitioner contends that it should not be included.

Four of the five petitioned for locations are within the borough of Manhattan in New York City, the fifth is

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[33] See *Crucible Steel Castings Company*, 90 NLRB 1843 (1950), cited with approval in *Manufacturing Woodworkers Association of Greater New York, Inc.*, 194 NLRB 1122, 1123 (1972).

[34] The parties are in apparent agreement that I.D.C.'s terminals located in Bath, Lehighton, Meyerstown, Somerset, and Wilkes Barre, Pennsylvania, and which are represented by various locals of the I.B.T. are properly excluded from the instant unit. They are also in apparent agreement that the employees at I.D.C.'s Florida location, who do not appear to be employed in unit classifications, are also properly excluded. Moreover, in light of the record as a whole and noting in particular that there is no evidence of common supervision or employee interchange and the large geographic separation between these facilities and the petitioned for locations, I would in any event find that a unit limited to the petitioned for locations and excluding the above-mentioned locations to be an appropriate one. See *Barr's Jewelers*, 131 NLRB 235, 236 (1961).

located in Jersey City, New Jersey, approximtately 10 miles to the west. The record establishes that the hiring for all five facilities is done at the 247 West 35th Street location and that all personnel records are kept there. The record further indicates that all five facilities are under the overall supervision of I.D.C. official Joseph Johnson and that there are frequent temporary transfers of employees between the five facilities. The Board has long held that a unit consisting of all an employer's facilities within a distinct metropolitan geographic area may be an appropriate one,[35] and it has also held the greater New York metropolitan area to be such a geographic area.[36]

In light of the geographic location of the five facilities the common supervision exercised by Johnson over them,[37] the centralized hiring and the frequent temporary transfer of employees, I find that the employees of the petitioned for five facilities share a sufficient community of interest to constitute an appropriate unit.[38]

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[35] See *Crown Drug Company*, 108 NLRB 1126, 1127 (1954).

[36] See generally *Dun & Bradstreet, Incorporated*, 194 NLRB 9 (1971).

[37] The evidence is unclear as to whether the five petitioned for locations constitute an administrative division within the Employer's organization. However, the record is clear that Johnson supervises these facilities and there is no evidence that he supervises any others. In similar circumstances the Board has held a grouping of facilities to be "in effect an administrative division within the Employer's organization" and evidence of a community of interest among the employees employed therein. See *White Cross Discount Centers, Inc.*, 199 NLRB 721, 722 (1972). I so find in the instant case.

[38] See *Advance Industrial Security Inc.*, 225 NLRB 151, 152 (1976). See also *Daytex, Inc.*, 201 NLRB 406 (1973).

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As the record establishes that Johnson does not supervise the Philadelphia facility, and that, while there have been several permanent transfers between this facility and the New York metropolitan area facilities at the request of the employees involved, there has been little or no temporary transfer of employees, and giving due consideration to the geographic separation between the facilities, I find that the employees of the five petitioned for facilities share a community of interest separate and apart from the community of interest of the Philadelphia facility employees and accordingly I will limit my Direction of Election herein to those five facilities.[39] Moreover, I note that even assuming *arguendo* that the employees of the Philadelphia facility shared a sufficient community of interest to be included in the instant unit, as there is no evidence that the instant collective bargaining agreement was applied on a "members-only" basis at the facility, it is still in effect as a bar.[40]

In light of all the above and the record as a whole, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All chauffeurs, drivers, helpers, handlers, Class A mechanics, Class B mechanics, and mechanics' apprentices employed by the Employer, Interstate

[39] See *Barr's Jewelers, supra.*

[40] See *Malco Theatres Inc.*, 222 NLRB 81, 82 (1976).

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Dress Carrier, Inc.,[41] at its 265 Broadway, Jersey City, New Jersey, 107 West 37th Stret, New York, New York, 515 West 35th Street, New York, New York, 247 West 35th Street, New York, New York and 155 West 35th Street, New York, New York terminals but excluding all office clerical employees, professional employees, guards, foremen[42] and all other supervisors as defined in the Act.

[41] As noted, the record reflects that all of the employees in the instant unit are now on the payroll of I.D.C. and that neither G.S. Supply or G.S. Temporary exercise any control over their employment. Accordingly, I shall omit G.S. Supply and G.S. Temporary from the Direction of Election and dismiss the petition as it applies to them without prejudice. See *Fraser-Brace Engineering Company, Inc.*, 38 NLRB 1263, 1264-1265 (1942).

[42] The record reflects and I find that the Employer's foremen have the authority to assign and responsibly direct unit work. Accordingly, I find that they are supervisors within the meaning of Section 2(11) of the Act and therefore exclude them from the instant unit.

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DIRECTION OF ELECTION

An election by secret ballot will be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacement. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Union Local 20408 of the United Warehouse, Industrial and Affiliate Trades Employees' Union; by Local 102, Cloak and Dress Drivers and Helpers Union, International Ladies' Garment Workers' Union, AFL-CIO; or by neither.

Appendix C

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office Room 1600, 970 Broad Street, Newark, New Jersey 07102 on or before February 2, 1979. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This

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request must be received by the Board in Washington by February 8, 1979.

ARTHUR EISENBERG
Regional Director
National Labor Relations Board
Twenty-Second Region
970 Broad Street
Newark, New Jersey 07102

Signed at Newark, New Jersey
this 26th day of January, 1979.

Supreme Court, U. S.
FILED
APR 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1368

CONSOLIDATED CARRIERS CORP., and/or
TRUCKING PERSONNEL, INC.,

Petitioners,

—against—

CLOAK DRESS DRIVERS AND HELPERS UNION LOCAL 102,
INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT

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MEMORANDUM OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT

Consolidated Carriers Corp. ("Petitioner"), which is admittedly bound by a collective bargaining agreement with respondent, Cloak, Dress Drivers & Helpers Union, Local 102, International Ladies' Garment Workers' Union, AFL-CIO ("Local 102"), seeks to stay a pending arbitration brought against it for violations of the collective bargaining agreement. Both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit rejected Petitioner's application based upon this Honorable Court's decision in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964).

1. Petitioner's major reason for seeking a writ is that this Honorable Court's decision in *Carey* v. *Westinghouse*

Electric Corp., supra, should be re-evaluated and overruled. That 15 year-old decision has been a hallmark of labor law, standing for the proposition that arbitration proceedings under a collective bargaining agreement advance the statutory objective of promoting industrial peace and stability. Petitioner advances no viable reason for abandoning this basic labor law principle.

2. The facts underlying this case are set forth in full in the District Court's decision (Appendix B). Petitioner admits being bound by a collective bargaining agreement with Local 102 which contains a broad arbitration clause providing for the arbitration of all complaints, disputes and grievances between Local 102 and Petitioner. There are no exceptions to this arbitration clause. The collective bargaining agreement vests in the Arbitrator the power to determine whether Petitioner has utilized a scheme or device to avoid or evade the provisions of the agreement by its transactions with an affiliate or subsidiary firm. Local 102 filed a complaint with the Arbitrator charging that Petitioner, by or through its affiliated or subsidiary firm, Trucking Personnel, Inc., has violated the agreement by underpaying its workers, failing to provide contractual holidays and vacations, failing to make appropriate contributions to health, welfare and pension funds on behalf of such workers and other violations. The issues raised in this complaint are standard issues for any industry-wide Arbitrator to determine and, unless there is a specific exemption for the determination of such issues in the arbitration agreement, the Arbitrator should be permitted to rule on those complaints.

3. The grievance arbitration procedure has been described as being "at the very heart of the system of industrial self-government." *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581 (1960). In the *Warrior & Gulf* case and its companion, *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960), this Court established that the function of the court is limited "to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract" *(United Steelworkers* v. *American Mfg. Co., supra* at 568) and that doubts as to coverage of the arbitration clause should be resolved in favor of arbitration (*United Steelworkers* v. *Warrior & Gulf, supra* at 583).

4. Although it is conceded by Petitioner that it is bound to arbitrate its disputes with Local 102, Petitioner attempts to enjoin the arbitration on the grounds of a pending petition for an election filed with the NLRB by an unrelated union, Local 20408. Petitioner takes the position that the issues raised in the representation proceeding were synonymous with the issues raised by Local 102 in the arbitration proceeding.* This is not true. The issue before the NLRB is whether or not to conduct an election among certain employees of Petitioner while the issue before the Arbitrator is whether or not Petitioner violated its contractual obligations as set forth in the collective bargaining agreement, and if so, the appropriate award to be rendered in order to remedy such violation. Thus, the petition of Local 20408 seeks prospective relief and does not in any way seek relief for the past contract violations of the Local 102 contract. The only forum for obtaining remedial relief for past con-

* The hearing in the representation proceeding has been delayed by the filing of unfair labor practice charges by Local 20408 against Petitioner (but not Local 102). Those charges have not as yet been litigated. To delay contract grievance arbitration during the time it will take the NLRB to resolve both the unfair labor practice charge and the representation proceeding would be an unconscionable denial to the covered workers of their right to have their contract enforced.

tract violations is the arbitration process set forth in the collective bargaining agreement between Local 102 and Petitioner.

5. Arbitration is recognized as an instrument of national labor policy for composing contractual differences and, as a result, this Court has repeatedly upheld the use of the arbitration process even where a similar issue has simultaneously been before the NLRB. See, for example, *Carey* v. *Westinghouse Electric Corp., supra* (1964); *United Steelworkers* v. *Warrior & Gulf Navigation Co., supra.*

6. Even if there were a similarity between the issues set before the arbitrator and before the NLRB, which Local 102 has shown is not true, the statutory scheme as shown by court decisions does not preempt the arbitrator from adjudicating the contract dispute, *Carey* v. *Westinghouse Electric Corp., supra.* As this Court stated in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 452 (1957):

> "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

See also *Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 511 (1962); *Teamsters Local* v. *Lucas Flour Co.,* 369 U.S. 95, 101 n.9 (1962); *William E. Arnold Co.* v. *Carpenters,* 417 U.S. 12, 16 (1974); S. Rep. No. 105, 80th Cong., 1st Sess., 15-18.

7. Whether or not an election is ordered by the NLRB (and Local 102 believes an election will not be ordered),*

* Local 102 expects the petition filed by Local 20408 to be dismissed because the petition seeks an election in an improper unit and because the petition is barred by the collective bargaining agreement between Local 102 and Petitioner.

Local 102 is entitled to have its rights against Petitioner pursuant to the collective bargaining agreement determined by the Arbitrator with respect to any and all existing or past violations of the agreement by Petitioners. "The authority of the Board and the law of contracts are overlapping concurrent regimes, neither preempting the other." *United Aircraft Corp.* v. *Canal Lodge 700,* 436 F.2d 1 (2nd Cir. 1970).

8. Petitioner argues that the *Carey* decision, *supra,* was based upon the NLRB's determination in *Raley's Inc.,* 143 NLRB 256 (1963), which decision, Petitioner argues, has been overruled. Whether the NLRB is disillusioned with the doctrine of *Raley's, supra,* as claimed by Petitioner is not the issue in this case since the question in *Raley's* was whether the NLRB would defer a representation issue to an arbitrator's award. The question in the instant case is not deferral but whether arbitration should be enjoined. Petitioner is mistaken in its assumption that this Court in *Carey* relied upon the *Raley's* decision. Raley's case was cited by this Court in a footnote in which it discussed the circumstances under which NLRB will defer to arbitrational awards. The *Carey* decision which permits arbitration to proceed is still good law. In *Retail Clerks, Local 588* v. *NLRB,* 565 F. 2d 769 (D.C. Cir. 1977), the Court following *Carey, supra,* held that courts had power to compel contractually authorized arbitration even as to matters that, in whole or in part, concern representational issues. The Circuit Court found that arbitration has a "pervasive, curative effect" even if it is used in a representation matter since the NLRB as well as the parties may benefit from the efforts of an impartial arbitrator's attempt to sort out the facts of the case and interpret the contract. Id. at 777. See also *Carey, supra,* at 272-273.

9. Petitioner annexes as Appendix C a decision by the Regional Director of the Twenty-Second Region of the NLRB in a case involving Interstate Dress Carriers, Inc., an employer wholly unrelated to Petitioner. That decision is irrelevant to the instant application. Petitioner argues that, since the Regional Director held that Local 102's contract was not a bar to a petition for an election in the IDC case, therefore, Local 102's contract with Petitioner cannot bar the election in the instant proceeding. Petitioner misstates the rationale of the IDC decision. The Regional Director found that the Local 102-IDC contract was "not a 'members only' argument on its face." (Appendix C, p. 36a). The contract was valid between the parties but was not properly applied to all employees by Local 102 and therefore it could not bar the election. The Regional Director's decision did not decide whether or not IDC had violated its agreement with Local 102 and, in fact, arbitration proceedings in that case are continuing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

Supreme Court, U. S.
FILED
APR 10 1979
MICHAEL ROBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1368

CONSOLIDATED CARRIERS CORP., and/or
TRUCKING PERSONNEL, INC.,

Petitioners,

vs.

CLOAK DRESS DRIVERS AND HELPERS UNION LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

I

Pursuant to Rule 24(4) of the Rules of the Supreme Court of the United States, Petitioners submit this reply to the Respondent's Memorandum in Opposition to Granting the Writ of Certiorari ("Memorandum").

Respondent's claim (*p. 2 of Memorandum*) that there is "no viable reason" for allegedly abandoning the so-called rule of *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964) is wrong on two counts: this Honorable Court has not enunciated a rule squarely dealing with the applicability of arbitration to a pure representation issue and, second, the General Counsel, in his 1979 first quarterly report, has now concluded a union violates Section 8(b)(a)(1)(A), (2) and (3) of the Labor-Management Relations Act of 1947, as amended ("Act") when it seeks to arbitrate an issue of representation "notwithstanding [a] colorable contract right upon which its demand for arbitration may have been premised".

II

Respondent is not arbitrating an abstract issue of an alleged evasion of a labor contract (*p. 2 of Memorandum*) but a claim that Trucking Personnel, Inc. ("Trucking") is an affiliate of Consolidated Carriers Corp. ("Consolidated") and, accordingly, the former's employees are represented by Respondent. But this is the precise issue involved in a certification proceeding now pending before the National Labor Relations Board ("Board") to which Respondent and a rival union are parties. Contrary to Respondent's cavalier statement that an election will not be ordered by the Board (*p. 4 of Memorandum*), the "contract bar" defense of Respondent has been rejected at this point.

The issue before the Board, contrary to Respondent's specious claim (*p. 3 of Memorandum*), is not whether "to conduct an election of certain employees of Petitioner", but to determine whether Respondent represents the employees of Trucking and Consolidated, again the very issue which Respondent asks the arbitrator to decide.

To suggest that Respondent may obtain "relief for the past contract violations" (*p. 3 of Memorandum*) is absurd. A predicate for such relief is proof that Respondent represented Trucking's employees and that its labor contract was not restricted to "members only". A decision has already been made that the labor contract applies only to members of Respondent employed by signatories to the identical labor contract upon which Respondent relies in the pending arbitration. This is a decision exclusively for the Board to make, and not for an arbitrator.

Respondent's gloss on the decision by the Regional Director of the Twenty-Seventh Region of the Board and affirmed by the Board (*p. 6 of Memorandum*) is unanswerable because it is incomprehensible.

III

It is egregiously erroneous to suggest that Consolidated seeks to "enjoin the arbitration on the grounds of a pending petition for election filed" with the Board (*p. 3 of Memorandum*). Consolidated seeks to enjoin the arbitration because the issue of representation, which Respondent seeks to disguise by homilies about the arbitration, cannot be resolved by an arbitrator.

Respectfully submitted,

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